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No. 39

In the Supreme Court of the United States

OCTOBER TERM, 1952

WILLIAM BAUMET, *Petitioner*

v.

UNITED STATES OF AMERICA and JOHN J. PETERS

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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APPENDIX TO THE BRIEF FOR THE UNITED STATES

United States District Court

SOUTHERN DISTRICT OF NEW YORK

Civil 26-397.

WILLIAM BAUMET, *Plaintiff*

against

UNITED STATES OF AMERICA and JOHN J. PETERS, *Defendants.*

Opinion

KAUFMAN, D. J.

William Baumet, Jr. died on October 26, 1942, while in active military service in the armed forces of the United States. As beneficiary of the proceeds of his National Service Life Insurance policy, he had designated his uncle, John J. Peters. After Baumet's death, both the plaintiff, his natural father, and Peters, his uncle, filed claims with the Veterans Administration for the proceeds of the policy. After investigation, the Administrator determined that the uncle stood in the relation of *loco parentis* to the insured, and was entitled to the fund (see *National Service Life Insurance Act of 1940* [38 U.S.C. 801 ff]

§602(g)). Thereafter, pursuant to §617 of the Act, the father instituted this action against the United States to recover the proceeds of the policy.

Peters, the uncle, was permitted to intervene in the action and filed a crossclaim against the United States, demanding that the proceeds of the policy be paid to him.

Thereupon, the Veterans Administration withheld payment from both claimants, and the disposition of the fund is awaiting the determination of this action.

Four years after the determination by the Administrator that Peters was entitled to the fund, but before this action had come to trial, Peters died. This motion was thereupon made by his executrix, Julie Peters, for an order substituting her as a defendant herein in his stead.

Rule 25(a)(1) of the Federal Rules of Civil Procedure, providing for substitution, declares:

> "If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party."

Under this Rule, the court may order substitution of Peters' executrix only if Peters' claim to all or part of the proceeds of the policy has not

been extinguished by his death (*Edner* v. *Mathews*, 44 F. Supp. 873; *Kamoses* v. *Martin*, 6 F.R.D. 585).

Under the Act, the proceeds of the policy are payable in installments (Sec. 602(h)).

The executrix argues, in effect, that the finding by the Administrator that Peters was entitled to the award under the policy was a final and binding determination which vested Peters with the right to all installments which fell due prior to his death, and that his executrix is entitled to be substituted herein in order that she may recover the amount thereof.

That contention is untenable under the Act. Section 617 of the Act provides:

> "In the event of a disagreement as to claim arising under this part, suit may be brought in the same manner and subject to the same conditions and limitations as are applicable to United States Government (converted) life insurance under the provisions of sections 19 and 500 of the World War Veterans' Act, 1924, as amended: *Provided* that in any such suit the decision of the Administrator as to waiver or nonwaiver of premiums under section 602(n) shall be conclusive and binding on the court."

From this it follows that, except for the decision of the Administrator as to waiver or non-

waiver of premiums under §602(n) of the Act—a matter not here involved—the issues tendered in the action are to be resolved by judicial, and not administrative, determination.

The Act is clear and unequivocal in making the existence in being of the beneficiary at the time of payment a condition of the making of payment, irrespective of when payment fell due under the terms of the policy. Section 602(i) specifically declares that:

> "* * * The right of any beneficiary to payment of any installments shall be conditioned upon his or her being alive to receive such payments. No person shall have a vested right to any installment or installments of any such insurance and any installments not paid to a beneficiary during such beneficiary's lifetime shall be paid to the beneficiary or beneficiaries within the permitted class next entitled to priority * * *."

Section 602(j) directly prohibits the payment of any such installments to the estate of the beneficiary, as such: It provides that:

> "No installments of such insurance shall be paid to the heirs or legal representatives as such of the insured or of any beneficiary, and in the event that no person within the permitted class survives to receive the insurance

or any part thereof no payment of the unpaid installments shall be made."

Under the provisions of these sections of the Act, no rights are conferred on a beneficiary with respect to installments which fall due, but are not paid to the beneficiary, during his lifetime, and such installments do not inure to the beneficiary's estate upon the latter's death (See *Carpenter* v. *United States*, 72 F. Supp. 510; *Washburn* v. *United States*, 63 F. Supp. 224, 228).

Where Congress has sought to confer legally enforceable rights to installments due, but unpaid, upon the estates of beneficiaries under government life insurance policies, it has done so in clear and unambiguous language. Thus, under the World War Veterans' Act of 1924, as amended, Section 26 (38 U.S.C. 451), accrued installments of insurance unpaid at the time of the death of the beneficiary could be paid to the beneficiary's personal representatives, while the present value of all installments not yet due fell to the estate of the insured (Section 303 (38 U.S.C. 514)). The meaning of this specific statutory language was explained in *Lopez* v. *United States*, 82 F. (2d) 982, where the court said:

"The result of these enactments is that when a liability under a policy is established, but the insurance has not been paid prior to the death of the insured, the installments which would have accumulated from the date

> of the insured's permanent and total disability to the date of his death should be paid to his estate, while those which would have accumulated from his death to the date of the death of the beneficiary should be paid to the estate of the beneficiary, and the commuted value of the installments remaining should be paid to the estate of the insured." (p. 986).

The effect of the 1924 Act, therefore, was to provide a clear and precise statutory scheme whereby installments accrued, but unpaid, during the lifetime of the beneficiary, became part of the latter's estate (*McCullough* v. *Smith*, 293 U.S. 228; *Singleton* v. *Cheek*, 284 U.S. 493). But by subsections (i) and (j) of Section 602 of the National Service Life Insurance Act of 1940, Congress expressed a contrary intent with regard to all policies maturing before August 1, 1946. Consequently, John J. Peters' claims under the policy were extinguished by his death; his executrix has no interest in the policy, and the motion to substitute her for him must be denied.

Rule 25 (a) (1) also requires that the action, with regard to the deceased Peters, be dismissed (*Anderson* v. *Yungkau*, 329 U. S. 482)

Settle order on notice.

December 31, 1948.

/S/ SAMUEL H. KAUFMAN
UNITED STATES DISTRICT JUDGE.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 44—October Term, 1949.

(Argued October 14, 1949

Decided October 28, 1949.)

Docket No. 21409

WILLIAM BAUMET, *Plaintiff-Appellee,*

v.

UNITED STATES OF AMERICA, *Defendant-Appellee,*

—and—

JOHN J. PETERS, *Defendant,*

—and—

JULIE PETERS, Executrix of the Last Will and Testament of John J. Peters, Deceased,

Appellant.

Before: AUGUSTUS N. HAND, CHASE and FRANK, *Circuit Judges.*

Appeal from an order of the United States District Court for the Southern District of New York. *Reversed.*

SAMUEL SEGAL, *for plaintiff-appellee;*

SIMPSON THACHER & BARTLETT (Thomas Thacher, of counsel) *for appellant.*

The facts are fully stated in the opinion of the district court, reported in 81 Fed. Supp. 1012.

FRANK, *Circuit Judge:*

The district court so interpreted the statute as to reach a result which ascribes to Congress a capricious purpose. Doubtless the court arrived reluctantly at this conclusion, for such an interpretation should be rejected unless inescapable.

"On this appeal, we must assume that, were plaintiff permitted to remain in this litigation, the district court would find that certain instalments came due and were payable to Peters during his lifetime. But the district court's interpretation would deny those payments to Peters' estate—and give them to the father—simply because the officer charged with paying them delayed in so doing until Peters died. This result is shocking." For the delay resulted solely from the fact that the father, whom the Administrator had previously held entitled to nothing while Peters lived, began a suit to overturn that decision. Under the district court's ruling, the father wins the instalments, no matter how specious his claim, if only he can make his law-suit outlive Peters. We think that such an unreasonable interpretation of the statute can and should be escaped.

Section 602(i)—38 U. S. C. A. §802(i)—provides: "The right of any beneficiary to payment

of any instalments shall be conditioned upon his or her being alive to receive such payments." The right to payment is not conditioned upon the beneficiary's being alive when such payments happen to be made, but "upon his or her being alive to receive such payments." As Peters was alive and ready to receive the accrued instalments, the statutory condition was satisfied, and the right to those instalments became vested in him.

All the other provisions of the statute on which the district court relied must, we think, be read in the light of the language we have quoted. Those other provisions showed that Congress intended this and no more: no rights should vest in (or in behalf of) any beneficiary merely because of the maturity of the policy during the life of the designated beneficiary, except in so far as that beneficiary continued to live as instalments fell due. Congress did not specifically cover the situation present here, *i.e.*, a delay in paying instalments that came due while the designated beneficiary still lived. But, having in mind the obvious over-all common-sensible purpose of the statute, we think that Congress intended that, in such circumstances, the right to those instalments should become irrevocably fixed in the beneficiary and should therefore pass to his estate.

REVERSED.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

WILLIAM BAUMET, *Plaintiff*

against

UNITED STATES OF AMERICA, JULIE PETERS, individually and as executrix of the last will and testament of John J. Peters, Deceased, and HARRIET, JOAN, LIONEL and DWIGHT BAUMET, Infants by Catherine Baumet, their Guardian ad Litem.

Defendants

Opinion

CLANCY, D. J.

1. Plaintiff is the father and Alice Peters Baumet was the mother of William Baumet, Jr. born on April 5, 1920. Some five years later Alice Baumet left her husband and took their son with her to her mother's house where lived other members of the Peters family, one of whom was her brother, John J. Peters. She was divorced in 1927 the decree requiring payment by the plaintiff to the wife for support of herself and their son of the sum of $50. monthly. Thereafter and sometime in 1929 Alice Baumet moved to Albany with her son and lived there until 1932, when she remarried. Plaintiff meantime lived in Chicago, Detroit and New York and sent few and inconsiderable sums of money at infrequent intervals to Alice Baumet and some to the boy after her remarriage.

2. In 1936, Alice Baumet died and William Baumet, Jr. then came to live with his father who had remarried and then had two other children. The family lived in a four room apartment and William Baumet, Jr. was given one room while the plaintiff, his wife and two children occupied another. William Baumet, Jr. lived with them from 1936 to 1937 and attended high school from which he was graduated in 1937. The mother left to William Baumet, Jr. insurance monies which less expenses, amounted to something in excess of $1700 and plaintiff was appointed general guardian of the son's person and of his property, the insurance money. More than $1600 of this sum had been withdrawn and spent in December, 1938.

3. In September, 1937, William Baumet, Jr. entered the University of Wisconsin, at Madison, Wisconsin. On finishing his Freshman year he stayed in Wisconsin working. He returned to his father's home for a visit of ten days before he returned to the University for his Sophomore year. His tuition for that year was paid by the plaintiff out of William Baumet, Jr.'s trust fund and some money for living expenses was paid to him out of the same fund. Whatever monies were actually forwarded to him by the plaintiff he contracted debts to the student fund and to his fellows at college to such an extent that his embarrassment at his inability to repay them caused him to leave college in November, 1938, without notifying his

father, whom he blamed for the situation. His aunt, Betty Peters, and his uncle, John J. Peters, were notified by the Florida police on his advice as the persons most likely to help him and who would be interested in his situation. The Florida police apparently had picked him up for investigation upon his arrival there alone. John J. Peters sent the police the money for William Jr.'s travel to his home and William Baumet, Jr., returned to the home of John J. Peters and lived there always thereafter. Immediately upon his return Julie Peters—the husband's business being just then new and not too profitable—with funds procured by the sale of a fur piece of hers, purchased for the youth a complete wardrobe. Thereafter she continuously looked after the laundry, repair, maintenance and replacement of his clothing.

4. Before this time the plaintiff was subjected to a compulsory accounting in the Surrogate's Court of New York County of his disbursement of the monies belonging to his son and reported to the Special Guardian appointed by the Surrogates' Court that he sent him $50. monthly in accordance with an order of the Surrogate. Whether any or if any particular money vouchers for these payments were submitted to the special guardian did not appear but the account was approved. In 1938 he was again compelled to account. At that time the fund was depleted to a

sum less than $100. This accounting was brought about by a written complaint registered by the son with one of the clerks of the Surrogates' Court that the plaintiff was misappropriating the funds of which he was the guardian. In December, 1938, by some arrangement which was not elucidated and after the boy's return from Florida, plaintiff was confronted by his son at the office of a New York attorney. The son was accompanied by John J. Peters with whom he was living and Peter's lawyer and whatever developed, the conference ended in plaintiff's resignation as his son's guardian. The residue of the fund, then less than $100, together with a contribution by the plaintiff which brought the amount to $341, was then entrusted to the uncle, John J. Peters as guardian of the property of William Baumet, Jr.

5. After this meeting at the attorney's office plaintiff never saw his son again and took no measures to look for or after him in any respect whatever and manifested no interest in his career and extended no care even in the slightest degree. His conduct constituted an abandonment of his son.

6. In 1939, after a reprimand from Julie Peters, William Baumet, Jr. ran away and lived in a furnished room for five days. Julie Peters, accompanied by Betty Peters, located him and went after him and he returned of his own volition with them to the Peters home.

7. At the insistence of John and Julie Peters some time in May, (1939), William Baumet Jr. visited Wisconsin University to apply for re-admission for the 1939 Fall term. He was re-admitted to the University and some time in the summer of that year returned to Madison, Wisconsin, and obtained employment. Julie Peters supplied him with the funds necessary to pay the debts owed to the University fund and to student creditors, a necessary requisite to his readmission to the University. Julie Peters also supplied him with the travelling expenses. William Baumet, Jr.'s tuition for the 1939 Fall term was paid by his uncle out of the trust fund. William Baumet, Jr. remained at the University until some time in January, 1940 when he left school with a broken wrist and returned to the home of John and Julie Peters, where he remained until sometime in the early summer of 1940, when, at the urging of John and Julie Peters, he again returned to Madison, Wisconsin, to arrange his re-entry into the University of Wisconsin in September of 1940. He remained there for the full school year with the exception of the Christmas vacation which he spent at the home of John and Julie Peters. The guardianship account was necessarily exhausted at or before April, 1941, however sparingly it was dispensed and the only source of funds to educate and support him other than the small sums earned at two jobs, was John and Julie Peters. In June

of 1941, at the end of the school year, he entered the United States Naval Reserve. At all times during this period he had a room at the home of John and Julie Peters. It contained such personal possessions as he had not taken to school with him. During all of these times John and Julie Peters and William Baumet, Jr. carried on a correspondence marked by interest in each other and affection on both sides. Also during all of these times both John and Julie Peters sent him sums of money out of their own funds and for not only his needs such as dental bills but for his spending money. The letters on both sides evidenced that William Baumet, Jr. looked to John and Julie Peters as those persons on whom he could call for money as he needed it and they evinced a willingness to assume and defrayed as a duty the expenses of his maintenance and education at times. At times while he was in Wisconsin, William Baumet, Jr. was employed and earned comparatively paltry sums which he used for his own maintenance. There is no pretense anywhere in the evidence that he ever earned enough for his own support and tuition.

8. From June, 1941, when William Baumet, Jr. entered the service, until the time of his death, October 26, 1942, he was in frequent communication with John and Julie Peters by mail. In all of his applications and reports, both when he entered the service and on other occasions in his

life as a cadet flyer, he gave John J. Peters as his next of kin and as his adopted father and the address of John and Julie Peters as home. He progressed rapidly as a student at the flying school and was commissioned as a Marine flyer. In his correspondence with John Peters he explained his manner of spending his salary and expressed his intention to return for a vacation which was subsequently disallowed, and when he was sent from the school at Tallahassee to service in the West, he forwarded his clothes and such personal effects as he could not carry with him to the Peters home to be kept until his return from service. After William Baumet, Jr. entered into active service he still maintained his correspondence with John Peters and he referred unfailingly and with affection to Julie Peters.

9. On October 3, 1941, he applied for National Serice Life Insurance and a certificate for insurance in the sum of $10,000 was issued to him effective as of that date. The certificate was in full force and effect when he was killed at Guadacanal while in the service on October 26, 1942. In his application for this certificate of insurance he listed John J. Peters as his adopted father. He had his will stored in a metal box which was forwarded by the military authorities to John Peters as the decedents' next of kin. In it he disposed of a few hundred dollars to friends and recited the fact that John Peters was bene-

ficiary of his insurance policy and appointed John Peters as administrator of his estate.

10. During all this time following his leaving the University of Wisconsin, until the Fall of 1938, William Baumet, Jr. did not write to his father. He referred to him in his correspondence with John Peters and not in endearing or even respectful terms but on the contrary with expressions of distrust.

11. William Baumet, Jr. was a young man of good character and habits, not given to waywardness or disobedience. He was encouraged in virtue by John and Julie Peters and he respected and ordinarily obeyed their directions and accepted their authority. They went far out of their way to raise him in the practice of the religion he had inherited. In all things spiritual they were his guides and supervisors and in the development of his character which had its flowering in the course of his military service, they played a chief and laudable part. It was conclusively proved by all of the evidence in the case and is found that in 1938 John and Julie Peters assumed as a voluntary obligation, the duty of supporting William Baumet, Jr. and that they performed this duty throughout the rest of William Baumet, Jr.'s life. It was also proved that he looked to them for his support and accepted it as becoming his relationship to them. His conduct is consonant only with

an understanding on his part that they occupied the estate and position of his parents and that they on their part intended to establish and maintain that relationship to him. They were in every sense after 1938 in loco parentis to him in the most real, dutiful and happy sense of that phrase. They occupied that relationship at his death.

12. On or about May 18, 1944, it was determined by the Administrator of Veterans Affairs that John J. Peters stood in loco parentis to the insured within the meaning of the National Life Insurance Act and that his designation as beneficiary was valid.

Conclusions of Law

1. The complaint of William Baumet is dismissed.

2. Julie Peters, as Executrix of the Estate of John J. Peters, is entitled to the sums accrued but unpaid on the insurance policy on the life of *William Baumet, Jr. Baumet* v. *U.S.*, 177 Fed. (2d) 806.

3. Julie Peters, individually, is entitled to payment to her as a person in loco parentis of William Baumet, Jr., of all sums accruing on the policy on the life of William Baumet, Jr., after the date of the death of John J. Peters; i.e., June 28, 1948.

Plaintiff contends wherever William Baumet, Jr. resided at the time of his death and before, his domicile was that of the father as a matter of law, citing *Matter of Thorne,* 240 N. Y. 444, where a parent who had never abandoned her son survived. It has been found that the plaintiff abandoned his son in 1938 and it has been held in New York that an emancipated infant whose mother is dead could establish his own domicile. *Cohen* v. *Delaware, Lackawanna & Western R. R. Co.,* 150 Misc. 450. See too *Delqware, Lackawanna & Western R. R. Co.* v. *Petrowsky,* 250 Fed. 554. But we do not believe the decedent's legal domicile, if it were held to be other than Peter's home, is determinative of the plaintiff's claim. Both Julie and John J. Peters have fully met the test of a claim of an estate in loco parentis to the decedent to qualify themselves as beneficiaries of the decedent's policy in accordance with his selection of John Peters. It was demonstrated to a conclusion by the evidence of his way of life after 1938, when he became wholly dependent both corporeally and spiritually on John J. Peters and his wife. Decedent had no other means of support, for his earnings were comparatively inconsiderable. Everything that could have been done by natural parents in the way of his support, in the promotion of his interest and his future in the development of his character and the nurturing of decent aspirations was done by John and Julie

Peters and the doing of it all was accompanied by an affectionate devotion that called for a degree of self denial.

Plaintiff's contention that it should not be within the competence of a minor child to sever all relationship of parent and child by the mere exercise of his own volition even when that is persistent, is a distraction. The plaintiff has no answer to the charge against him borne out by the evidence. Even though he has the advantage of a presumption founded in the law of nature that the relationship of natural parents to their offspring persists, it was his own conduct, proved indeed out of his own mouth on cross-examination as well as by the other evidence, that overwhelmed the presumption and sustained the intervening defendants' case. When the plaintiff's first wife died she left a fund for the youth who thereafter lived for a year with the father. So far as can be found in the evidence plaintiff never contributed to his support from his own earnings. He made continual drafts on the son's money in his custody as guardian. It would be quite possible that a young man at college would contract debts for considerations that would not deserve his father's respect. There is no evidence that William Balmet, Jr. was a gambler or a boy of bad habits. The sums owed by him were to the college fund which undoubtedly asked the reason for borrowing it and to his college mates in sums that were

consonant with the life of any good boy at college and the Court is convinced the borrowings were obtained to meet the need for current expenses which the plaintiff's failure to contribute to him even out of the son's own money left the boy unable to meet. In 1937 plaintiff swore in his compulsory account he was withdrawing $30 monthly for the boy's support although he had him living in miserable circumstances. This would be quite within the rights of a poor father and we do not mean that the plaintiff at that time was rich but he himself puts forward the claim that he was then supporting his son out of his own money which he certainly was not doing. If we accept the plaintiff's own story, he was advised by Betty Peters, a deceased aunt, that the boy had run away from college and was in Florida in 1938. He made no effort to find where the boy was and his own testimony indicates a conduct at this juncture in the boy's life wholly unlike what would be expected of a father. The son's judgment was fully confirmed. The conference with Peters was held in the office of the father's attorney. He says that he demanded that the boy return home. It was not testified that all of the three lawyers of that conference were dead but none was produced. The outcome of it was the plaintiff's resignation as guardian. The last two times when plaintiff saw his son he was in company with John J. Peters. It is plain that plaintiff then knew and

had earlier known that his son was at the Peter's home and had been there and thereafter was still there. Nevertheless he did nothing to regain custody of his son. The son had no further funds and whether that was the cause of the father's conduct, the fact remains that he made no effort whatever to visit his son or to effect any contact with him. The conclusion is compelled from all of this conduct's own part that he abandoned his son.

Plaintiff also makes a point that the decree of the Surrogate's Court appointed John J. Peters as guardian of the infant's property only, leaving the plaintiff guardian of the person. The proceeding for the guardian's discharge was apparently exparte and instituted by a specially designated special guardian because of the plaintiff's default in accounting. Any conclusion favorable to the plaintiff that a reasonable man would attempt to derive from the Surrogate's decree would meet with immediate and complete contradiction from everything that transpired thereafter in the plaintiff's life and in the relationship between himself and his son. It was certainly a peculiar guardianship of the person that he exercised for it was exercised wholly in absentia in as much as he had not seen his son for six months before and never before. The accounting was an exparte proceeding before a special guardian specially designated and to procure it

for his failure in filing his annual account. It furnished no support for plaintiff's claim and implies a good deal to hurt it.

No reason appears why the terms of the insurance certificate in this case should not be literally enforced. No person appears entitled at the time of his death except John J. Peters whom he specifically named as beneficiary. It has already been decided in this very case, 177 Fed. (2d) 806, by our Court of Appeals that John J. Peters if otherwise eligible is entitled to payment of the sums accrued while he lived during the pendency of this action. This eligibility has been demonstrated and his executrix takes such sums. His widow was in loco parentis to the decedent from 1938 to the time of his death. She and nobody else comes within the statute's definition of parent, *Leverly* v. *U. S.* 162, Fed. (2) 79, at 85, et seq., and the regulation adopted by the Veterans' Administration, *Veterans Regulation No. 10,* Subd. VII, 38 U.S.C.A. 1949, pocket Part Pg. 208. She is therefore the only person entitled to the amounts coming due after the date of her husband's death.

The argument of the plaintiff that the claim of Julie Peters is outlawed by the statute of limitations, 38 U.S.C.A. 445, is invalid. Her cause of action obviously came into being in June, 1948. She cross-claimed in this action and filed a formal claim with the Veterans' Administration in

December of that year. The certificate of insurance itself subjects the parties to it to all the amendments of the law. So we regard the suggestion of the plaintiff advanced since the trial, that the 1944 amendment which included a person in loco parentis within the definition of parent was not retroactive, as insubstantial.

Although the Court dismissed the plaintiff's complaint at the close of the plaintiff's case, this decision has been arrived at on the entire case.

JOHN W. CLANCY
United States District

Dated New York, N. Y.,
November 3, 1950

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Order and Final Judgment

Civ. 26-397

WILLIAM BAUMET, *Plaintiff*,

– against –

UNITED STATES OF AMERICA, JULIE PETERS individually and as executrix of the last will and testament of John J. Peters, Deceased, and Harriet, Joan, Lionel and Dwight Baumet, Infants, by Catherine Baumet, their Guardian ad Litem, *Defendants*.

The plaintiff William Baumet having filed his complaint herein against defendant United States of America, demanding payment to him of certain benefits payable under a policy of National Service Life Insurance bearing No. 5,005,826 issued to William Baumet, Jr., deceased, by defendant United States of America; John J. Peters, the beneficiary named in said policy of National Service Life Insurance, having by order of this Court been permitted to intervene in this cause as an additional party defendant; defendant John J. Peters having thereupon served and filed an answer to the complaint and a cross-claim against defendant United States of America demanding

payment to said defendant John J. Peters of said proceeds; the plaintiff having served and filed a reply to said answer and cross-claim of defendant John J. Peters; defendant United States of America having served and filed an answer to the complaint and a reply to the cross-claim of defendant John J. Peters; two pre-trial conferences having been held herein; defendant John J. Peters having served and filed an amended answer and cross-claim pursuant to a pre-trial order of this Court; defendant John J. Peters having died before this cause came on for trial; Julie Peters, executrix of the last will and testament of John J. Peters, deceased, having moved for an order for her substitution as a defendant herein in place of the said John J. Peters; an order of this Court denying such motion having been reversed by the Court of Appeals for the Second Circuit and plaintiff's motion for a rehearing having been denied by the said Court of Appeals, and plaintiff's petition for writ of certiorari having been denied by the Supreme Court of the United States, and plaintiff's motion for leave to file a petition for rehearing of his petition for writ of certiorari having been denied, and an order on the mandate of said Court of Appeals, allowing the substitution of Julie Peters, executrix of the last will and testament of John J. Peters, deceased, as a defendant herein in place of the said John J. Peters having been made and filed by this Court;

the motion of Julie Peters, individually, for leave to intervene herein, having been granted by this Court, and said Julie Peters, individually, having served and filed her answer and cross-claim herein; plaintiff having thereupon served and filed his reply to the answer and cross-claim of Julie Peters; the motion of Catherine Baumet, as Guardian ad Litem of Harriet, John, Lionel and Dwight Baumet, infants, for leave to intervene having been granted by order of this Court, and said infants having served and filed their answer and cross-claim herein; and defendant Julie Peters having served and filed her reply to the cross-claim of Harriet, Joan, Lionel and Dwight Baumet, infants; a third pre-trial conference having been had; the motion of Julie Peters that this cause be brought on for trial peremptorily on the first day of the 1950 term, having been granted by order of this Court; the issues in this action having thereafter come on regularly for trial before the Honorable John W. Clancy, sitting without a jury, commencing on the 6th day of October, 1950 and continuing thereafter until concluded on the 11th day of October, 1950, at the United States Court House in and for the Southern District of New York; all parties having appeared by attorney and full hearing and due deliberation having been had, the defendant Julie Peters, individually and as executrix of the last will and testament of John J. Peters, deceased, having moved

for judgment dismissing the complaint of the plaintiff William Baumet, dismissing the cross-claim of the infant defendants Harriet, Joan, Lionel and Dwight Baumet, and for judgment in favor of the defendant Julie Peters, individually and as executrix, against the United States of America, as prayed for in the cross-claim of John J. Peters, deceased, and the cross-claim of Julie Peters; the Court having made and filed on the 3rd day of November, 1950 certain findings of fact and conclusions of law and a decision in favor of the defendant Julie Peters, individually and as executrix of the last will and testament of John J. Peters, deceased, directing judgment as hereinafter stated; and costs to said defendant Julie Peters against plaintiff being allowable according to law, and the costs of the said defendant Julie Peters having been duly taxed at One Hundred forty-two and 62/100 dollars ($142.62);

Now, on motion of Messrs. Simpson Thacher & Bartlett, attorneys for said defendant Julie Peters,

IT IS ORDERED, ADJUDGED AND DECREED that

1. The complaint of the plaintiff be dismissed on the merits, with prejudice;

2. The cross-claim of the infant defendants be dismissed on the merits with prejudice;

3. The motion of Julie Peters, as executrix

of the last will and testament of John J. Peters, deceased, for judgment on the amended answer and cross-claim of said John J. Peters be granted;

4. The motion of Julie Peters, individually, for judgment on her answer and cross-claim, be granted;

5. The defendant, Julie Peters, individually and as executrix, recover of the defendant United States of America the proceeds of a certain policy of National Service Life Insurance bearing No. 5,005,826, according to the terms of the refund life income plan of settlement (Option 4, as selected by said Julie Peters in her affidavit dated November 20, attached hereto;

6. The defendant, Julie Peters, as executrix of the last will and testament of John J. Peters, deceased, recover of the defendant United States of America, the sum of Three thousand six hundred ninety-eight Dollars and forty cents ($3,698.40), being the sum accrued on June 28, 1948, but unpaid on that date, upon National Service Life Insurance policy No. 5,005,826;

7. The defendant, Julie Peters, individually, recover of the defendant United States of America, the sum of One thousand

five hundred Dollars and eighty cents ($1,500.80), being the sum accrued on the said policy between June 28, 1948, and November 28, 1950;

8. The defendant Julie Peters, individually, recover of the defendant United States of America, the sum of Four thousand eight hundred and twenty-four Dollars ($4,824.00) payable in ninety successive monthly instalments on the 26th day of each month of her life commencing with the month of November, 1950, as computed according to the Refund Life Income Plan of settlement of said policy of National Service Life Insurance, such plan being sometimes referred to as "Option 4" as set forth in 38 C.F.R. § 8.75(c); § 8.79;

9. The defendant United States of America deduct ten per cent (10%) of the monthly instalments which have accrued upon the aforesaid policy from October 26, 1942, to November 28, 1950, and pay such sum to Messrs. Simpson, Thacher & Bartlett, attorneys for defendant Julie Peters, individually and as executrix, for professional services rendered in this cause, and deduct ten per cent (10%) of such sums as may hereafter be paid to said defendant Julie Peters on such policy, and pay the same to Messrs.

Simpson, Thacher & Bartlett for professional services rendered herein, all as provided in Section 817 of the National Service Life Insurance Act, (54 Stat. 1008, 1014, c. 757, Title VI, Part I, § 601, 617; 38 U.S.C., § 801, 817) as amended;

10. The sum of One Hundred forty-two and 62/100 Dollars ($142.62), costs in this action is hereby awarded against the plaintiff and that the defendant Julie Peters, individually and as executrix under the last will and testament of John J. Peters, deceased, have judgment and execution therefor.

Judgment signed this 1st day of December, 1950.

(sgd) JOHN W. CLANCY
U.S.D.J.

Judgment entered
WILLIAM V. CONNELL
Clerk

Dec. 6, 1950.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Affidavit

Civ. 26-397

WILLIAM BAUMET, *Plaintiff*,

– against –

UNITED STATES OF AMERICA, JULIE PETERS, individually and as executrix of the last will and testament of John J. Peters, Deceased, and Harriet, Joan, Lionel and Dwight Baumet, Infants, by Catherine Baumet, their Guardian ad Litem, *Defendants*.

STATE OF NEW YORK
COUNTY OF NEW YORK } ss:

JULIE PETERS, being duly sworn, deposes and says:

I am a defendant and cross-claimant, both individually and as executrix of the last will and testament of John J. Peters, deceased, in the above entitled action. I have been informed of the decision rendered herein in my favor both individually and as executrix.

It is my wish that all accrued proceeds of the policy of National Service Life Insurance at issue herein, whether due me in my individual or in my

represenative capacity, be computed and paid according to the terms of the Refund Life Income Plan, presently known as "Option 4", and that all future proceeds due to me under said policy be paid to me under the same Plan of Settlement. I have instructed my attorneys to use the aforesaid Plan of Settlement as a basis of computation of the sums to be recovered by me as set forth in the judgment to be entered herein.

Sworn to before me this 20th day
of November, 1950.
Notary Public

COPY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 270—October Term, 1950.

(Argued June 12, 1951 Decided July 23, 1951)

Docket No. 22009

WILLIAM BAUMET, *Plaintiff-Appellant,*

v.

UNITED STATES OF AMERICA, *Defendant-Appellee,*

and

JULIE PETERS, individually and as executrix under the Last Will and Testament of John J. Peters, Deceased, *Defendant-Appellee,*

and

HARRIET, JOAN, LIONEL and DWIGHT BAUMET, infants, by Catherine Baumet, their Guardian ad Litem, *Defendants-Appellants.*

Before:

SWAN, *Chief Judge,* and AUGUSTUS N. HAND and L. HAND, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York

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Action by William Baumet to recover the proceeds of a National Service Life Insurance policy, wherein other claimants intervened and filed cross-claims. From a judgment dismissing the complaint of the plaintiff and the cross-claim of infant intervenors, and awarding recovery to the cross-claimant Julie Peters, as executrix of the designated beneficiary, and individually, the plaintiff and infant cross-claimants appeal. Judgment affirmed.

BARNET L. ARLAN, Attorney for appellants.

SIMPSON, THACHER & BARTLETT, Attorneys for appellee; Thomas Thacher and Robert W. Sweet, of counsel.

SWAN, *Chief Judge*:

This is an action brought against the United States pursuant to the National Service Life Insurance Act of 1940, as amended, 38 U.S.C.A. Sec. 817, to recover the proceeds of a $10,000 policy issued to William Baumet, Jr., who died in military service in October 1942. The plaintiff is the insured serviceman's father. Cross-claims were filed by several intervenors, and the United States admitted its liability and its readiness to pay such person as the court should adjudge entitled. The first cross-claimant was John J. Peters, a maternal uncle of the insured and the

"designated" beneficiary of the policy. In 1948 and before the case came to trial, Peters died. His widow, Julie Peters, then intervened, claiming as his executrix the instalments which matured before his death.[1] She also claimed in her individual right as a person standing *in loco parentis* to the insured,[2] instalments maturing after her husband's death. Four infant intervenors, half-brothers and half-sisters of the serviceman, by their guardian *ad litem*, filed a cross-claim alleging that they came next in line after their father, the plaintiff, on the statutory ladder of dispositive precedence.[3] The case as tried to the court without a jury. Judgment was rendered dismissing the plaintiff's complaint and the infants' cross-claim, and awarding recovery to Julie Peters as executrix and individually. The losing parties have appealed.

With respect to the infants' appeal no discussion is required. Their brief concedes that their claim is contingent, being predicated only on their right to take future instalments in the event of the death of the prior beneficiary. Upon the plaintiff's appeal the primary issue is the correctness of the court's finding that John and Julie Peters stood in *loco parenti* to the insured for a period

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[1] See *Baumet* v. *United States*, 2 Cir., 177 F. 2nd 806, cert. den. 339 U.S. 923.

[2] 38 U.S.C.A. Sec. 801 (f) as amended.

[3] 38 U.S.C.A. Sec. 802 (h) (3) (D).

of not less than one year prior to his enlistment in June 1941.[4] The court made very detailed findings of fact with respect to the insured's life from his birth on April 5, 1920, to his death in October 1942. Only a brief summary need be here recited. When he was five years old his parents separated and thereafter he lived with his mother until her death in 1936. He then lived for a year or so at the home of his father, who had remarried. In September 1937 he entered the University of Wisconsin. In his sophomore year he ran away from college, without notifying his father, and went to Florida. There, penniless, he was picked up by

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[4] The pertinent sections of the statute are the following sections of Title 38, as amended:

Section 801 (f) defines the terms "parent", "father" and "mother" to include "persons who have stood in loco parentis to a member of the military or naval forces at any time prior to entry into active service for a period of not less than one year"

Section 802 (g) provides: "The insurance shall be payable only to a widow, widower, child * * * parent, brother or sister of the insured." It gives the insured the right to designate the beneficiary of the insurance, "but only within the classes herein provided."

Section 802 (h) (3) provides to whom shall be paid instalments remaining unpaid at the death of any beneficiary: "(C) if no widow, widower, or child, to the parent or parents of the insured who last bore that relationship, if living, in equal shares;"

Section 802 (i) deals with payment of benefits if no beneficiary is designated by the insured. This section is applicable to instalments maturing after the death of John J. Peters.

the police who, at his request, notified his uncle John J. Peters, who supplied money for his return to the home of John and Julie Peters. This was in November 1938. Continuously thereafter their home was regarded as his both by him and by them. After 1938 his father never saw him, manifested no interest in his career and contributed nothing toward his support. The son charged the father with misappropriating trust funds left to the boy by his mother, of which the father had possession as his guardian, and this led to litigation in the Surrogate's Court and to a permanent estrangement between them. In 1939 the boy reentered the University of Wisconsin; he came back to his uncle's house with a broken wrist in January 1940 but again returned to Wisconsin in the summer of 1940 and went back to college in September. From 1938 on he had his own room in the home of his uncle and aunt in which he kept his personal belongings.

Whether or not the evidence is sufficient to show that the plaintiff "abandoned" his son, as Judge Clancy found, it is clear that by the end of 1938 the son had decided to be done with his father. He was then 18 years old and his choice of whom to live with would ordinarily be accepted by a court, at least if he elected to live with a kindly-disposed uncle and aunt rather than a hostile father. The appellant argues that regardless of the showing of affection and generosity on the part of the boy's

foster parents, the evidence is insufficient to establish that they assumed responsibility for his support—which we have held to be necessary to prove the existence of the *in loco parentis* relationship.[5] Judge Clancy found expressly that they did. We cannot say that this finding is "clearly erroneous"; hence it must stand. Indeed, we agree with it. When at the end of 1938 or early in 1939 the uncle, as the substituted guardian, took over control of the trust fund, it amounted to only $341. The boy's tuition at the University for the 1939 Fall term was paid out of this trust fund. How much, if anything, was left does not appear. He attended the University from September 1940 to June 1941, and the only source of funds for his education and support, other than the trust fund, if any, and small sums earned at two jobs during the summer of 1940, was what John and Julie Peters sent him. Mrs. Peters, although her memory was naturally vague as to amounts, testified that they did send him money out of their own funds. We cannot doubt that during the year just prior to the insured's enlistment in June 1941, they stood "in loco parentis" to him, even if that phrase be construed strictly in accordance with the common law doctrine with respect to support.

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[5] *Strauss* v. *United States*, 160 F. 2d 1017, 1019, cert. den. sub nom., *Goldbaum* v. *United States*, 331 U.S. 850, following the Sixth Circuit in *Niewiadomski* v. *United States*, 150 F. 2d 683, cert. den. 331 U.S. 850.

It is true that he became of age on April 5, 1941, but the *in loco parentis* relationship begun during minority is not lost when the minor attains majority.[6] Since John Peters stood *in loco parentis* to the insured and was the "designated" beneficiary his claim is superior to that of the natural father with respect to the instalments which matured before his death, and they were correctly awarded to the executrix of John Peters.

With respect to instalments maturing after the designated beneficiary's death, since no contingent beneficiary was designated, the appellant contends that he is entitled to share them equally with Julie Peters even if the finding that she was *in loco parentis* is allowed to stand. Section 802 (i) provides that "If no beneficiary is designated by the insured * * * the beneficiary shall be determined in accordance with the order specified in subsection (h) (3) of this section." Subsection (h) (3) (C), before its amendment in 1946, read as follows:

> "(C) if no widow, widower, or child, to the parent or parents of the insured, if living, in equal shares;"

Under this provision it may well be that the natural father would be entitled to share with the

[6] *Bland* v. *United States*, 5 Cir., 185 F. 2d 395. Cf. *Zazove* v. *United States*, 7 Cir., 156 F. 2d 24, holding the relationship may exist even if begun after minority.

foster mother of the insured. But the amendment introduced the limiting clause "who last bore that relationship".[7] The insured can have but one maternal parent and one paternal parent.[8] Since Section 801 (f) recognizes a person *in loco parentis* as a parent, the parents of William Baumet, Jr., at the time of his enlistment were Julie Peters, his foster mother, and John Peters, his foster father. Hence John Peters was the paternal parent who last bore that relationship to the insured, and the appellant cannot satisfy the statutory requirement. If *Henning* v. *United States*, D. Mass., 93 F. Supp. 380, holds the contrary we respectfully disagree with it. The award of future instalments to Julie Peters was correct.

Judgment affirmed.

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[7] Sec. 802 (h) (3): "(C) if no widow, widower, or child, to the parent or parents of the insured who last bore that relationship, if living, in equal shares;"

[8] V. A. Reg. No. 10, paragraph 7, 38 U.S.C.A. (1950 Supp.) p. 244.

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